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No. 99-1314

# In the Supreme Court of the United States

ROBERTO TEFEL, ET AL., PETITIONERS

*v.*

JANET RENO, ATTORNEY GENERAL, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

In Section 309(c)(5)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2196, Congress provided generally (but subject to various exceptions) that an alien is not eligible for suspension of deportation and adjustment of status under former 8 U.S.C. 1254(a) (repealed 1996) unless the alien was continuously present in the United States for seven years before being served with the Order to Show Cause commencing the alien's deportation proceedings. The questions presented are:

1. Whether IIRIRA § 309(c)(5)(A) deprived petitioners without due process of law of a constitutionally protected right to seek relief in the form of suspension of deportation; and

2. Whether the government should be estopped from applying IIRIRA § 309(c)(5)(A) in the cases of Nicaraguan nationals because, before IIRIRA was enacted, the Immigration and Naturalization Service publicly promoted a program under which Nicaraguan nationals were permitted to move to reopen their deportation proceedings and apply for suspension of deportation, upon payment of a fee.

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*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 180 F.3d 1286. The decision of the district court denying the government's motion to dismiss the complaint and provisionally certifying the class is reported at 972 F. Supp. 608. The decision of the district court entering the preliminary injunction (Pet. App. A37-A88) is reported at 972 F. Supp. 623. The decision of the district court denying the government's motion to dissolve the preliminary injunction (Pet. App. A89-A99) is reported at 996 F. Supp. 1.

### JURISDICTION

The judgment of the court of appeals was entered on July 14, 1999. A petition for rehearing was denied on October 6, 1999. On December 30, 1999, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including February 3, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case presents a challenge to the enforcement of Section 309(c)(5)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, Tit. III, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2196. IIRIRA § 309(c)(5)(A) provided that an alien who applied for suspension of deportation under former 8 U.S.C. 1254(a) (repealed 1996) is not eligible for such relief unless the alien was continuously present in the United States for seven years before the alien was served with the Order to Show Cause (OSC) commencing the alien's deportation proceedings. That seven-year cutoff at the time of service of the OSC is known as the "stop-time rule." Petitioners contend that the stop-time rule of IIRIRA § 309(c)(5)(A) deprives them, without due process of law, of a constitutionally protected right to apply for suspension of deportation. They also contend that the government should be estopped from applying IIRIRA § 309(c)(5)(A) in the cases of Nicaraguan nationals because, before the enactment of IIRIRA, the Immigration and Naturalization Service (INS) promoted a program under which certain Nicaraguan nationals who were subject to orders of deportation could move to reopen their deportation proceedings and apply for suspension of deportation. The district court entered a preliminary injunction preventing the government from applying the stop-time rule in administrative deportation proceedings involving members of the class, but the court of appeals vacated the injunction, finding that petitioners had not established a likelihood of success on the merits of either claim.

1. Before the amendments to the Immigration and Nationality Act (INA) enacted by IIRIRA in 1996, an alien who was subject to deportation could apply for suspension of

deportation and adjustment of status to that of a lawful permanent resident (LPR). 8 U.S.C. 1254(a). Such relief was available in the discretion of the Attorney General. To qualify for consideration for suspension of deportation, the alien was required to demonstrate, *inter alia*, that he had been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application [for relief]." 8 U.S.C. 1254(a)(1).[1] The time that an alien spent in deportation proceedings before issuance of a final order of deportation was counted toward the requirement of seven years' continuous physical presence in the United States. See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

2. On June 12, 1995, before the enactment of IIRIRA, the Attorney General terminated a special program established in 1987 for review of deportation orders affecting Nicaraguan nationals.[2] She also authorized the INS to institute a transitional program, under which certain Nicaraguans subject to final orders of deportation with seven years of continuous physical presence in the United States could file motions to reopen their deportation proceedings in order to apply for suspension of deportation and adjustment of

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[1] The alien was also required to demonstrate that he was of good moral character and that his deportation would result in "extreme hardship" to himself or a spouse, parent or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1).

[2] Under the Nicaraguan Review Program (NRP), the files of Nicaraguan nationals subject to final orders of deportation were subject to mandatory review by the INS and the Office of the Deputy Attorney General. See Complaint Exh. 2. The NRP was established by Attorney General Meese to provide an additional level of review for Nicaraguans whose applications for asylum were denied. Complaint Exh. 4. Three years after the transition to a democratically elected government in Nicaragua, Attorney General Reno determined that it was no longer necessary to continue the NRP. *Ibid.*

status. Complaint Exh. 3.[3] Under that transitional program, a Nicaraguan who filed a motion to reopen could remain in the United States pending the adjudication of the application for suspension of deportation, and could apply for work authorization. Complaint Exhs. 2, 3. The INS also reiterated that Nicaraguans who feared persecution on account of political opinion could apply for asylum. Complaint Exhs. 2, 4.

3. On September 30, 1996, Congress enacted IIRIRA. That statute abolished the old distinction between deportation and exclusion proceedings, repealed the provision for suspension of deportation in former 8 U.S.C. 1254(a), instituted a new form of proceeding known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal." See 8 U.S.C. 1229(a), 1229b (Supp. IV 1998). Under the latter provision, the Attorney General may in her discretion cancel the removal of an alien if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is an LPR) or has been continuously present in the United States for ten years (if the alien is not an LPR). 8 U.S.C. 1229b(a) and (b) (Supp. IV 1998).

For purposes of eligibility for cancellation of removal, however, the required continuous residence or physical presence is "deemed to end when the alien is served a notice to appear," 8 U.S.C. 1229b(d)(1) (Supp. IV 1998), not when the alien makes his application for relief. The Notice to Appear is the document that commences removal proceedings under IIRIRA, and replaces the old Order to Show Cause, which commenced deportation proceedings under the INA before IIRIRA. See 8 U.S.C. 1229(a) (Supp. IV 1998). Thus,

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[3] Prospective applicants were informed that the fee for a motion to reopen was $110, and that the fee for an application for suspension of deportation, to accompany the motion to reopen, was an additional $100. Complaint Exh. 4.

IIRIRA instituted a new "stop-time" rule under which the service of the Order to Show Cause cuts off the time that is counted towards establishing an alien's eligibility for cancellation of removal, and the time that an alien spends in removal proceedings is not counted.

The new cancellation of removal provisions (including the ten-year eligibility requirement for aliens who are not LPRs) were generally not made applicable to aliens whose immigration proceedings were commenced prior to April 1, 1997, the general effective date of IIRIRA. IIRIRA did, however, contain a special "transitional rule with regard to suspension of deportation," which provided that the new stop-time rule was to apply to "notices to appear" issued before, on, or after the date of enactment of IIRIRA, *i.e.*, September 30, 1996. Specifically, IIRIRA § 309(c)(5) provided:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [(8 U.S.C. 1229b(d) (Supp. IV 1998))] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

110 Stat. 3009-627.

4. A predecessor to the statute that eventually became IIRIRA was introduced in the House of Representatives as H.R. 1915 on June 22, 1995. 141 Cong. Rec. 16,881 (1995). That bill contained a Section 309(c)(5), the predecessor to what was ultimately enacted as IIRIRA § 309(c)(5). That provision contained language to the effect that, for applications for suspension of deportation pending more than 30 days after enactment, the period of continuous physical presence would be deemed to have ended when the alien was served an Order to Show Cause, even if the application for suspension had been filed before the enactment of the

legislation.[4] The Justice Department did not endorse that provision, generally described the curtailing of discretionary relief in the proposed legislation as "drastic," and urged that some form of discretionary relief from removal be retained. See Resp. Exh. B2, at 3. On August 4, 1995, H.R. 1915 was withdrawn from consideration, and new H.R. 2202 was introduced in its stead. 141 Cong. Rec. 22,112 (1995). H.R. 2202 contained a version of Section 309(c)(5) materially identical to the version in H.R. 1915. See H.R. 2202, 104th Cong., 1st Sess. § 309(c)(5) (1995). The Justice Department expressed concern regarding the proposed Section 309(c)(5) in the new bill, and urged that the then-current rules on physical presence in the United States remain in effect for already-pending applications. See Resp. Exh. B3, at 34.

The House Judiciary Committee reported H.R. 2202 with a significantly changed version of Section 309(c)(5). Consistent with the Justice Department's position, the Committee's version would have applied the cut-off date only to cases initiated after the enactment of the Act. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 42 (1996). The Justice Department expressed support for that newly drafted version of Section 309(c)(5). Resp. Exh. B4, at 38. On March 21, 1996, the House of Representatives passed H.R. 2202 with the amended version of Section 309(c)(5) and sent the bill to the Senate. 142 Cong. Rec. 6015 (1996).

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[4] That bill would have provided:

> In applying section 244(a) of the Immigration and Nationality Act (as in effect before the date of the enactment of this Act) with respect to an application for suspension of deportation which is filed before, on, or after the date of the enactment of this Act and which has not been adjudicated as of 30 days after the date of the enactment of this Act, the period of continuous physical presence under such section shall be deemed to have ended on the date the alien was served an order to show cause pursuant to section 242A of such Act (as in effect on such date of enactment).

H.R. 1915, 104th Cong., 1st Sess. § 309(c)(5) (1995).

On April 15, 1996, the Senate began floor consideration of a separate immigration bill (S. 1664). 142 Cong. Rec. 7295 (1996). That bill did not contain any provisions regarding suspension of deportation. See S. 1664, 104th Cong., 2d Sess. (1996); S. Rep. No. 249, 104th Cong., 2d Sess. (1996). On May 2, 1996, the Senate replaced the provisions of H.R. 2202 with those of S. 1664, and passed the bill, which was then sent to a Conference Committee. See 142 Cong. Rec. 10,065 (1996).

On September 24, 1996, the Conference Committee submitted to both Houses a Report containing a new version of the legislation, which adopted restrictions on suspension of deportation derived from the House's version of the legislation and applied a stop-time rule based on service of the Notice to Appear on the alien. The Conference Report also inserted language into Section 309(c)(5) providing for the application of the new stop-time rule to applications for suspension of deportation in cases in which a notice to appear had been issued before the date of enactment of the proposed act. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 62 (1996). On September 28, 1996, H.R. 2202 was withdrawn, and the version of the bill that had been reported in the Conference Report was introduced in the House as part of H.R. 3610, an appropriations bill. 142 Cong. Rec. 26,091-26,139 (1996). The House passed H.R. 3610 on September 28, 1996, see *id.* at 26,112-26,113, and the Senate passed it on September 30, 1996, see *id.* at S11,936. It was signed by the President on September 30, 1996, and IIRIRA § 309(c)(5) was therefore duly enacted.

5. After enactment of IIRIRA, aliens in deportation proceedings argued that the new stop-time rule of IIRIRA did not apply to proceedings commenced before the full effective date of IIRIRA, April 1, 1997. That argument was based on language in Section 309(c)(5) directing that the new stop-time rule be applied in cases in which a "notice to appear" had been issued; under deportation proceedings initiated before IIRIRA's effective date, no document known as a

"notice to appear" existed, and proceedings were commenced by service of an Order to Show Cause.

On February 20, 1997, the Board of Immigration Appeals (BIA), in a case involving petitioner Baldizon, rejected that argument, and held that IIRIRA § 309(c)(5) required that the new stop-time rule be applied to all pending and future deportation proceedings, including those commenced before IIRIRA was enacted. *In re N-J-B-*, Int. Dec. No. 3415 (B.I.A. Feb. 20, 1997). The BIA concluded that the term "notice to appear" in IIRIRA § 309(c)(5) referred generically to a document initiating proceedings, and that, because Section 309(c)(5) expressly referred to such a document "issued before, on, or after" IIRIRA's enactment date, it necessarily included an Order to Show Cause issued before that date. *Id.* at 8-11. The BIA therefore held that, because of the new stop-time rule, Baldizon, who had entered the United States on August 5, 1987, who had been served with an Order to Show Cause on August 27, 1993 (less than seven years later), and whose application for suspension of deportation was still pending after the enactment of IIRIRA (more than seven years after her entry into the United States), was not eligible for suspension of deportation. *Id.* at 2, 13-14.

Baldizon filed a petition for review of the BIA's decision in the United States Court of Appeals for the Eleventh Circuit. *N-J-B-* v. *Reno*, No. 97-4400. On July 10, 1997, while that petition was pending, the Attorney General, exercising her authority under 8 C.F.R. 3.1(h)(1)(i), vacated the BIA's decision in *N-J-B-* and certified that case to herself for her review and determination. See *In re N-J-B-*, Int. Dec. No. 3415, at 39 (A.G. July 10, 1997). The Eleventh Circuit then dismissed Baldizon's petition for review for lack of jurisdiction because the Attorney General's vacatur of the BIA's decision rendered Baldizon's deportation order nonfinal. *N-J-B-* v. *Reno*, No. 97-4400 (July 27, 1999).

6. Meanwhile, on March 28, 1997, petitioners, aliens who had applied for suspension of deportation, filed this case as a class action in district court. The named plaintiffs were more than 30 Nicaraguan nationals, one Salvadoran national, one Haitian, one Malaysian, and one Iranian.[5] Count 1 of the complaint alleged that the BIA's construction of the stop-time rule of IIRIRA § 309(c)(5) in *N-J-B-* as applying to deportation proceedings commenced before IIRIRA's effective date was arbitrary and capricious and contrary to the INA. Count 2 alleged that the same application violated constitutional principles of equal protection and due process. Count 3 alleged that the government was estopped from enforcing IIRIRA § 309(c)(5) against the members of the class who are Nicaraguan nationals, because, before IIRIRA was enacted, the government had allegedly induced them into applying for suspension of deportation and paying fees for such applications.[6] As relief, petitioners requested that

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[5] The proposed class was defined as follows:

> All individuals within the states of Georgia, Alabama and Florida who have been or will be denied suspension of deportation as a result of the BIA's decision to apply the transitional rule of § 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) retroactively to persons who have sought or are seeking suspension of deportation.

Complaint ¶ 55. Petitioners further described the class as follows:

> This case also consists of a subclass of members within the class who are Nicaraguan nationals who paid substantial fees to reopen their cases and/or to seek suspension of deportation as a result of the defendants' inducements and promises that their applications for suspension would be considered when in fact the defendants now refuse to consider such applications.

*Ibid.*

[6] Count 4 alleged that petitioner Baldizon had been denied the right to counsel in her proceedings before the BIA. Complaint ¶¶ 75-76. The lower courts have not addressed that claim in detail, and it will not be further discussed in this brief. See Pet. App. A6 n.5.

the government be enjoined from adjudicating the suspension of deportation applications of class members on the basis of the BIA's decision in *N-J-B-*.

On May 20, 1997, the district court provisionally certified a class. *Tefel* v. *Reno*, 972 F. Supp. 608, 617-618 (S.D. Fla. 1997). On June 24, 1997, the district court granted petitioners' motion for a preliminary injunction, and prohibited respondents from enforcing *N-J-B-*, or pretermitting applications for suspension of deportation based on *N-J-B-*, against any class member Pet. App. A37-A88. In ruling that petitioners had a substantial likelihood of success on the merits, the court concluded that the BIA had misinterpreted IIRIRA § 309(c)(5) in *N-J-B-* (*id.* at A56-A58); that the BIA's interpretation deprived petitioners of due process because the INS's previous actions in encouraging Nicaraguan nationals to apply for suspension of deportation had created "a property or liberty interest in the right to a hearing on their claims for suspension of deportation," which claims were now pretermitted by the *N-J-B-* decision (*id.* at A65); and that the government should be estopped from applying IIRIRA § 309(c)(5) to Nicaraguan class members because, in 1995 and 1996, it had encouraged those class members to apply for suspension of deportation even though it was "well aware * * * that there was a substantial likelihood that suspension of deportation in one manner or another would be drastically curtailed" by Congress, but had not disclosed that fact to class members (*id.* at A70) (internal quotation marks omitted).

7. On November 19, 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2193. Section 203(a)(1) of NACARA amended IIRIRA § 309(c)(5) to make clear that the stop-time rule of IIRIRA does apply even to deportation proceedings opened before April 1, 1997, by service of an Order to Show Cause (rather than a Notice to

Appear).[7] Section 203(f) of NACARA also made that amendment effective as if included in the original enactment of IIRIRA. 111 Stat. 2200.

Section 203(a)(1) of NACARA also created important exceptions to the new stop-time rule for certain qualifying aliens from El Salvador, Guatemala, and Eastern Europe. The exception allowed qualified nationals of those countries to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence stopped at the time an Order to Show Cause or Notice to Appear was served on them. See NACARA § 203(a)(1), 111 Stat. 2196-2198 (adding new IIRIRA § 309(c)(5)(C)).

Although NACARA § 203 did not exempt Nicaraguans from the stop-time rule for purposes of suspension of deportation, NACARA § 202 provided them with even broader relief. While other aliens must meet the continuous presence requirement with the application of the stop-time rule (unless they are exempt under NACARA § 203), and must also demonstrate that they are eligible for suspension of deportation under prior 8 U.S.C. 1254(a) by establishing extreme hardship before having their status adjusted to that of a lawful permanent resident, NACARA § 202 provided qualified Nicaraguans the opportunity to apply directly for adjustment of status to that of a lawful permanent resident,

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[7] NACARA § 203(a)(1) amended IIRIRA § 309(c)(5) to read in part as follows:

> (A) IN GENERAL.— * * * [P]aragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2196 (emphasis added).

without the need also to apply for suspension of deportation. Under this special adjustment provision, any Nicaraguan who has been physically present in the United States continuously since at least December 1, 1995, and who is otherwise admissible in accordance with certain specified provisions, is eligible to have his status adjusted to that of an LPR if he has applied before April 1, 2000; the alien need not establish extreme hardship. See NACARA § 202(b)(1), 111 Stat. 2194. A similar privilege was extended to certain Haitian nationals in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, sec. 101(h), Tit. IX, § 902(b), 112 Stat. 2681-538.

8. The government moved in the district court for dissolution of the injunction, contending that NACARA had codified the BIA's interpretation of IIRIRA § 309(c)(5) in *N-J-B-*. On February 10, 1998, the district court denied that motion. Pet. App. A89-A99. Although the district court agreed that Congress's "codification [in NACARA] of the BIA's interpretation of IIRIRA section 309(c)(5) directly refutes this Court's conclusion that Matter of N-J-B- was likely wrongly decided," and that petitioners "cannot continue with that claim in the face of NACARA's unambiguous directive," *id.* at A95, it nevertheless concluded (*id.* at A95-A96) that petitioners' constitutional challenge to the application of IIRIRA § 309(c)(5) to their cases was unaffected by NACARA. The government appealed from the district court's order denying the motion to dissolve the preliminary injunction.

9. The court of appeals reversed the district court's conclusion that petitioners had shown a likelihood of success on the merits, vacated the preliminary injunction, and remanded for further proceedings, including a reexamination of the certification of the class. Pet. App. A1-A36.

The court of appeals rejected the district court's conclusion that the petitioners' expectation in having their suspension-of-deportation applications adjudicated in any

particular manner constituted a constitutionally protected liberty or property interest, and that subjecting them to new requirements might constitute a deprivation of due process. Pet. App. A24-A29. Although the court accepted the proposition that the INS had encouraged Nicaraguans to apply for suspension of deportation before IIRIRA's enactment, it held that the "expectation" among Nicaraguan nationals that they would be considered for suspension did not amount to a liberty or property interest. *Id.* at A25. Relying on this Court's decision in *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981), the court observed that, where the executive has "unfettered discretion" to award relief, no liberty interest in that form of relief arises, even if the executive "consistently" grants such relief, or grants such relief in "most" cases. Pet. App. A25-A27. Since the Attorney General "possesses broad discretion in awarding suspension of deportation," *id.* at A27, and such a grant amounts to an "act of grace," *id.* at A28, the court concluded that no liberty or property interest in applying for suspension of deportation had been created, *ibid.*

The court also rejected petitioners' effort to employ estoppel against the government as a means of avoiding application of the statutory stop-time rule. Pet. App. A29-A34. The court first held that, even if estoppel may ever be applied against the government, the party seeking estoppel must demonstrate (in addition to the traditional elements of estoppel) "affirmative misconduct" on the part of the government. *Id.* at A32. Although the court of appeals was uncertain whether the district court had proceeded on the assumption that affirmative misconduct is a necessary element of estoppel against the government (*ibid.*), it rejected petitioners' theory that the government's actions in encouraging Nicaraguans to apply for suspension of deportation under prior law, even while being aware that Congress might change the law, amounted to affirmative misconduct (*id.* at A32-A33). The court observed (*ibid.*) that

"Congress sometimes appears likely to do things it never actually does, and the INS was entitled to operate under existing law until it was changed."

The court of appeals also directed the district court to reconsider its provisional certification of the class. Pet. App. A34-A35. The court observed that the class does not appear to meet the commonality requirement of Federal Rule of Civil Procedure 23(a)(2), in that the district court's decisions focused almost exclusively on INS actions directed towards Nicaraguan nationals, and yet its injunction encompassed non-Nicaraguans as well. Pet App. A34. The court also noted that NACARA had placed the Nicaraguan petitioners in a different legal position from that of the non-Nicaraguan petitioners. *Id.* at A35. In that regard, the court stated that passage of NACARA raised serious questions whether the named plaintiffs, who consist mostly of Nicaraguans, remain adequate class representatives. *Ibid.*[8]

10. Since the filing of the complaint, most of the named Nicaraguan petitioners have become legal permanent resident aliens.[9] The remaining named Nicaraguan petitioners

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[8] On remand, the government moved for decertification of the class, summary judgment, and dismissal. Petitioners requested a stay of the proceedings without a ruling on the government's motions, in light of their intention to file a certiorari petition. The government did not oppose that request, and on January 13, 2000, the district court stayed all proceedings on remand pending this Court's disposition of the petition.

[9] Our information respecting the status of the named petitioners has been obtained from the INS and the Executive Office of Immigration Review (EOIR), the separate component of the Department of Justice that is responsible for adjudicating deportation and removal proceedings before immigration judges (IJs) and the BIA.

Two of the named Nicaraguan petitioners (Lucretia Raudes and Carlos Morales) obtained LPR status before the filing of the lawsuit; they were granted suspension of deportation by an IJ, and the INS did not appeal those rulings to the BIA. See Complaint ¶¶ 12, 15.

In the cases of five named petitioners (Jaime Enriquez, Martha Enriquez, Edgar Enriquez, Freddy Quintero, and Ricardo Fonseca), the

have applied for adjustment of status under NACARA § 202 and are awaiting adjudication of their applications.[10] Petitioner Alexandra Charles, a Haitian national, has applied for adjustment of status under the Haitian Refugee Immigration Fairness Act. The stop-time rule of IIRIRA § 309(c)(5) appears not to apply to petitioner Roberto Amaya, a Salvadoran national whose deportation proceeding is currently pending before the BIA, because of the ex-

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IJ granted suspension of deportation, and after the filing of this lawsuit, the INS withdrew its appeals to the BIA.

The following 28 named Nicaraguan petitioners have become LPRs as a result of their applications for adjustment of status under NACARA § 202: Roberto Tefel, Leonel Martinez, Manuel Mantilla, Roberto Barberena, Lorena Garcia, Ana Borge, Ignacio Herrera, Nydia Mercado, Liliam Portillo, Sebastian Murillo, Jesus Chow, Gloria Guerrero, Douglas Membrano-Murillo, Damarys Contreras, Virginia Rodriguez, Juan Bermudez, Ricardo Bermudez, Leonte Martinez, Zulema Balladares, Boanerges Pao, Franklin Siu, Justina Jiron, Armando Largaespada, Herenia Matute, Enrique Sequeira, Dudley Rocha-Petterson, Ernesto Torres Sandoval, and German Reyes.

[10] The BIA remanded the case of petitioner Juan Gonzaga Baez to an IJ, who has scheduled a hearing on June 19, 2000, to adjudicate Baez's application for adjustment of status under NACARA § 202. Petitioner Norma J. Baldizon, whose deportation proceeding was certified to the Attorney General in *N-J-B-*, filed a motion to remand to apply for adjustment of status under NACARA; the Attorney General remanded her case to the BIA on August 20, 1999. The BIA further remanded her case to an IJ, who on January 7, 2000, terminated the deportation proceedings so that the INS may consider the merits of Baldizon's application for adjustment of status under NACARA. Similarly, the deportation proceedings of petitioner Carlos Rivas were closed at his request, so that he might file for adjustment of status under NACARA § 202. Petitioner Wilbur Baez withdrew as a class member on June 17, 1997. We have been unable to verify the current immigration status of petitioner Robert Rivera; no Nicaraguan national with that name has a case currently pending before the BIA, and Rivera's alien-registration number has not been provided to us in the course of this litigation. Based on the allegations in the complaint, however, Rivera appears to be eligible for adjustment of status under NACARA § 202.

emption for certain Salvadorans in NACARA § 203. In sum, it appears that only two named petitioners, Khadijeh Aidenezhad, an Iranian, and Subalecthumy Vengadasalam, a Malaysian, currently face the prospect of having the stop-time rule of IIRIRA § 309(c)(5) applied to their applications for suspension of deportation, which are currently pending before the Board of Immigration Appeals.

## ARGUMENT

The court of appeals correctly concluded that petitioners could not establish a likelihood of prevailing on the merits of either their constitutional or their estoppel challenge to the application of the stop-time rule of Section 309(c)(5) of IIRIRA, and therefore are not entitled to a preliminary injunction. That decision does not conflict with any decision of this Court or any other court of appeals. In addition, the issues presented by this case are of little general or continuing importance, because petitioners' challenges concern only eligibility for a form of discretionary relief (suspension of deportation) that has been prospectively repealed by IIRIRA; most of the petitioners are or may be eligible for suspension of deportation or adjustment of status without regard to IIRIRA § 309(c)(5); and the cases of the remaining petitioners do not squarely present either the constitutional or estoppel claim. Further review is therefore not warranted.

1. Petitioners argue that the stop-time rule of IIRIRA § 309(c)(5) deprived them, without due process of law, of the right to apply for suspension of deportation, and that the government should be estopped from relying on that stop-time rule in the cases of Nicaraguan nationals because the government had previously encouraged Nicaraguan nationals in the plaintiff class to apply for suspension of deportation. Those claims are of little continuing or general importance. First, the application of IIRIRA § 309(c)(5) affects only aliens who have sought to apply for suspension

of deportation, pursuant to former 8 U.S.C. 1254(a), in deportation proceedings commenced under pre-IIRIRA law. For removal proceedings commenced on or after April 1, 1997, and thus governed by IIRIRA, however, suspension of deportation has been repealed (see IIRIRA § 308(b)(7), 110 Stat. 3009-615) and replaced by a new form of relief known as "cancellation of removal" that is subject to different substantive terms. See 8 U.S.C. 1229b (Supp. IV 1998). Thus, the claims in this case concern only deportation proceedings affected by IIRIRA's transitional rules, and do not implicate any removal proceedings under the permanent provisions of IIRIRA.

Second, legislation enacted after IIRIRA has rendered moot or irrelevant the constitutional and estoppel claims of almost all the named petitioners. Petitioners purport to represent a class of aliens within Georgia, Alabama, and Florida who have been or will be denied suspension of deportation based on the application of IIRIRA § 309(c)(5) to their pending applications. In 1997, however, Congress enacted NACARA, which allowed qualified Nicaraguan and Cuban nationals to apply for adjustment of status to LPR without the need also to apply for suspension of deportation, and therefore without regard to the stop-time rule of IIRIRA § 309(c)(5). See NACARA § 202(b)(1), 111 Stat. 2194. Virtually all class members who are Nicaraguan nationals benefit from NACARA § 202, as exemplified by the named Nicaraguan petitioners in this case, who have already applied for and (in the vast majority of cases) have been granted adjustment of status through NACARA § 202. See pp. 14-15, *supra*.[11] Further, Section 203 of NACARA

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[11] Petitioners observe (Pet. 8) that family members of Nicaraguan class members who are themselves not nationals of Nicaragua or Cuba are not eligible for adjustment of status under NACARA. Any such family members, however, could benefit from specific family-sponsored visa

exempted qualified nationals of El Salvador from the application of IIRIRA § 309(c)(5)(A), and the one named petitioner of Salvadoran nationality appears from the complaint to meet the requirements for that exemption. See NACARA § 203(a)(1), 111 Stat. 2196; pp. 15-16, *supra*. Finally, Section 902(b) of the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-538, allowed qualified Haitian nationals to seek adjustment of status in a manner similar to that provided for Nicaraguans under NACARA, and the one named petitioner who is a Haitian national also appears from the complaint to be eligible for adjustment of status under that Act. See p. 15, *supra*.

As the court of appeals observed in ordering the district court to reconsider the certification of the class (Pet. App. A16), post-IIRIRA enactments leave only two named petitioners affected by post-IIRIRA legislation: Khadijeh Aidenezhad, an Iranian, and Subalecthumy Vengadasalam, a Malaysian. But it is not clear that the case of either Aidenezhad or Vengadasalam actually presents a constitutional or estoppel challenge to IIRIRA § 309(c)(5).[12] Petitioners have argued, for example, that a constitutionally protected property interest in applying for suspension of deportation was created by, among other things, the government's alleged "conduct in inducing and misleading applicants to come forward to apply" for suspension. Pet. 12. But petitioners have not argued that this government conduct of encouraging applications for suspension of deportation was

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provisions once the Nicaraguan class members obtained LPR status under NACARA § 202. See, *e.g.*, 8 U.S.C. 1153(a)(2).

[12] Those two petitioners did raise at the outset the claim that the BIA's construction of IIRIRA § 309(c)(5) in *N-J-B-* was legally erroneous, but that claim was mooted by the passage of NACARA, which codified the BIA's decision in *N-J-B-* and made it effective as if enacted in IIRIRA. See pp. 10-11, *supra*.

directed at any aliens other than Nicaraguan nationals, who were in an unusual situation because of the Attorney General's 1995 termination of the special program for review of deportation orders affecting Nicaraguans. See pp. 3-4, *supra*. Therefore, even under petitioners' theory, no aliens other than Nicaraguans had a liberty or property interest in applying for suspension for deportation. Similarly, because the government's encouragement of applications for suspension of deportation was directed only at Nicaraguans, only Nicaraguans could even arguably raise an estoppel claim.[13]

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[13] The INS and EOIR have recently implemented a program under which certain deportation cases that were commenced before the effective date of IIRIRA and are still pending may be administratively closed without a final decision on the alien's deportability. This program is intended to benefit aliens who would be barred by the stop-time rule of IIRIRA § 309(c)(5) from receiving suspension of deportation under old 8 U.S.C. 1254(a), but who would not now be barred by the stop-time rule from receiving cancellation of removal under 8 U.S.C. 1229b (Supp. IV 1998), because the Notice to Appear would have been served on the alien at a later date. Under this program, the INS and the EOIR will (in the absence of unusual circumstances) administratively close old deportation cases that meet three criteria: (1) the alien is not presently an LPR; (2) the alien would be eligible for suspension of deportation but for the new stop-time rule; (3) the alien would meet the ten-year physical presence requirement for cancellation of removal under Section 1229b if served with a Notice to Appear under the permanent rules of IIRIRA; and (4) the alien would be statutorily eligible for cancellation of removal under Section 1229b. It is anticipated that, in the future, the INS will commence removal proceedings against these aliens, so that the aliens may apply for cancellation of removal under Section 1229b. See Memorandum from INS General Counsel Owen Cooper (Dec. 7, 1999); Memorandum from INS General Counsel Paul W. Virtue (Dec. 7, 1998) (lodged with the Clerk). It appears that petitioner Aidenezhad would be eligible for administrative closure under this program, but that petitioner Vengadasalam would not; cancellation of removal for an alien who is not an LPR requires the alien to demonstrate that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen or an LPR, see 8 U.S.C. 1229b(b)(1)(D) (Supp. IV

2. Petitioners contend (Pet. 10-16) that, by enacting a stop-time rule that rendered them ineligible for the discretionary relief of suspension of deportation, Congress deprived them without due process of law of their constitutionally protected interest in applying for that relief. That contention is without merit.

As an initial matter, it is our position that, contrary to the ruling by the court of appeals on the point (see Pet. App. A17-A22), the district court did not have jurisdiction to entertain this suit. Petitioners seek to prevent immigration judges (IJs) and the Board of Immigration Appeals from applying the new statutory stop-time provision of IIRIRA and NACARA in deportation cases pending before them in which members of the petitioner class have applied for suspension of deportation. The proper way for petitioners to raise that claim, however, was to exhaust their administrative remedies before the IJ and the BIA, and then if relief were denied and the alien were ordered deported, to petition for review in the court of appeals pursuant to 8 U.S.C. 1105a. As this Court has specifically held, on petition for review, the alien may present any challenge he may have to the denial of suspension of deportation, see *Foti* v. *INS*, 375 U.S. 217 (1963), including a challenge based on constitutional grounds, see *INS* v. *Chadha*, 462 U.S. 919, 937-939 (1983). An alien may not avoid that exclusive procedure by separating out one issue that may bear on his deportation proceedings (including his application for suspension of deportation) and raising that issue in a suit filed in the district court. The cases on which the court of appeals relied to reach a contrary result involved alleged patterns of unconstitutional conduct *outside* the adjudication of deportation proceedings by IJs and the BIA. Because of this jurisdictional defect, if the Court granted review in this case, it

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1998), and Vengadasalam does not have such a close relative who is a citizen or LPR.

could not, in our view, grant petitioners the relief they now seek.

In any event, petitioners' due process claim is without merit. Petitioners strive to frame this case as involving a right to procedural due process in the deportation context, but they overlook the fact that the stop-time rule does not regulate the *procedure* for applying for suspension of relief. Rather, IIRIRA § 309(c)(5) changed the terms of aliens' statutory *eligibility* for that relief. Plainly, Congress has very broad authority to establish the substantive bases on which aliens may obtain discretionary relief from deportation. See *INS* v. *Phinpathya*, 464 U.S. 183, 195-196 (1984). Thus, to establish a due process violation, petitioners must show that the Constitution itself provided them with an interest in obtaining suspension of deportation without regard to the stop-time rule (*i.e.*, as long as they had been present in the United States for seven years before issuance of the final order of deportation) sufficient to warrant protection by the Due Process Clause.

This Court's decisions offer no support for such a proposition. To be sure, petitioners have a constitutionally protected liberty interest in avoiding deportation, and so their deportation proceedings must be conducted according to principles of due process. But petitioners have not argued that the procedures used by the immigration judges and the BIA to hear any contentions about their deportability, or even suspension of deportation or any other form of relief that might have been available to them, were fundamentally unfair. Rather, they have argued that they have a *separate* constitutionally protected interest in applying for suspension of deportation under the terms that were available to them before Congress enacted the stop-time rule of IIRIRA. But this Court has firmly rejected the contention that the Due Process Clause constrains Congress's power to make alterations in the terms on which individuals may obtain benefits from the government. See, *e.g.*, *Atkins* v. *Parker*, 472 U.S.

115, 129-130 (1985). Although the Court's decisions on that point have generally arisen in the context of public welfare benefits (see *id.* at 130 n.32), their reasoning applies with full force to discretionary relief from deportation, which this Court has consistently understood to be essentially an "act of grace" that resides in the "unfettered discretion" of the Attorney General (bounded, of course, by the terms of eligibility set by Congress). See *INS* v. *Yeuh-Shaio Yang*, 519 U.S. 26, 30 (1996); *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). Petitioners' argument, if accepted, would constrain Congress's ability to alter the grounds on which aliens may be deported or granted relief from deportation, a matter that this Court has viewed as part of Congress's plenary power to regulate immigration. See *Phinpathya*, 464 U.S. at 196; cf. *Fiallo* v. *Bell*, 430 U.S. 787, 798 (1977).

To put the matter another way, petitioners' due process claims fail because, to establish the existence of their asserted constitutionally protected interest, they must show both that they are eligible for the relief sought (suspension of deportation) and that they would be entitled to receive such relief. See *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60-61 (1999). Petitioners can clear neither hurdle in this case. Congress has declared (subject to exemptions created by NACARA, discussed at pp. 10-12, *supra*) that petitioners are ineligible for suspension of deportation because of the stop-time rule, and the Constitution itself does not suggest in any way that the stop-time rule is of questionable validity. Nor can petitioners establish that they have any *entitlement* to suspension of deportation sufficient to create a liberty or property interest protected by the Due Process Clause. Suspension of deportation resides in the discretion of the Attorney General. Accordingly, petitioners have no basis for a due process challenge to Congress's alteration of the terms on which aliens are eligible for suspension of deportation. Cf. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464-466 (1981)

(concluding that inmates in Connecticut had no entitlement to pardons, and therefore no liberty interest protected by due process in obtaining pardons, because the State had given its Board of Pardons "unfettered discretion" to determine whether any particular inmate should be granted a pardon).[14]

Petitioners attempt to establish a due process claim by arguing that they are seeking to vindicate a "right to apply" for discretionary suspension of deportation (Pet. 11-13). But since petitioners have no liberty or property interest in suspension of deportation on the substantive terms on which it was available before Congress enacted IIRIRA, petitioners have no separate constitutionally protected interest in the process for applying for suspension. As the Seventh Circuit observed in *Shvartsman* v. *Apfel*, 138 F.3d 1196 (1998), when one has no constitutionally protected interest in receiving a benefit, one also has no constitutionally protected interest in a particular process for proving entitlement to

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[14] Petitioners err in arguing (Pet. 11-12) that *Ponte* v. *Real*, 471 U.S. 491 (1985), modified the principle underlying the Court's decision in *Dumschat*. *Ponte* involved prisoners' constitutionally protected liberty interest in good-time credits, an entitlement that prisoners received based on their good behavior in prison. Petitioners, however, do not have and never had an entitlement to suspension of deportation. Similarly, petitioners' reliance (Pet. 11) on *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), is wide of the mark. In *Accardi*, the Court held that the Attorney General was required to follow his own regulations in ruling on applications for suspension of deportation, which required that the BIA exercise its own judgment in adjudicating aliens' applications for suspension. *Id.* at 265-268. *Accardi* was not expressly decided on a due process ground and is not framed in modern concepts of liberty and property interests. Moreover, as we have explained, this case does not involve procedures, and it certainly does not involve the Attorney General's failure to abide by her own regulations, as was the case in *Accardi*. The applicable law here is supplied not by regulation but by an Act of Congress—the stop-time rule of IIRIRA—and the Attorney General is following that law.

that benefit. "[D]efining access to procedures as a protectable property interest would eliminate the distinction between property and the procedures that are constitutionally required to protect it." *Id.* at 1199. Likewise, this Court has explained that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983).[15]

Nor is a different result compelled because the INS encouraged the Nicaraguan petitioners to apply for suspension of deportation, or because petitioners paid a fee when they did so. The payment of an application fee did not provide petitioners with a guarantee that their applications would be adjudicated under the substantive terms that governed suspension of deportation when those applications

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[15] Petitioners seek to rely (Pet. 13) on *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982) (*HRC*), to substantiate their claim of a "right to apply" for suspension of deportation. *HRC*, however, involved the rather different context of applications for asylum, and held only that, having created a procedural mechanism to apply for asylum, the government could not then make resort to that mechanism "utterly impossible" by instituting meaningless procedures. *Id.* at 1039. *HRC* was subsequently limited in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, 472 U.S. 846 (1985), which held that the government had no constitutionally based obligation to advise aliens of the opportunity to apply for the discretionary grant of asylum and emphasized (in language directly relevant here) that, "when dispensation of a statutory benefit is clearly at the discretion of an agency, or when a statute only provides that certain procedural guidelines be followed in arriving at a decision, then there is no creation of a substantive interest protected by the Constitution." 727 F.2d at 981. Moreover, in this case the government has not made it impossible for petitioners to apply for suspension of deportation; rather, IIRIRA made them ineligible for that relief. The appropriate analogy would be if Congress had enacted a statute constraining the terms on which aliens might be granted asylum in the discretion of the Attorney General. *HRC* did not suggest that such a statute would be unconstitutional.

were filed. If, for example, the BIA had altered some aspect of its decisional law governing suspension of deportation in a manner adverse to petitioners while those applications were pending, petitioners surely could not contend that the BIA was prohibited by principles of due process from applying that change in decisional law to their cases. The same would be true if the federal courts had issued a ruling on suspension of deportation that was generally adverse to aliens and led the BIA to apply a more restrictive approach to that form of relief. So too, the mere fact that petitioners paid a fee cannot prevent Congress from enacting changes to the law, even changes that govern applications for relief that are already pending at the time the law is changed.[16]

There is also no basis for petitioners' argument that the INS induced them to abandon their applications for asylum and thereby created a constitutionally protected interest in having their applications for suspension of deportation adjudicating according to particular terms. In the first place, the record shows that public announcements made by the INS in connection with the termination of the special review program for Nicaraguans made clear that Nicaraguans fearing persecution had the continuing right to pursue asylum applications as well as motions to reopen to pursue suspension of deportation. See Complaint Exhs. 2, 4. And

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[16] Although petitioners rely on *Furlong* v. *Shalala*, 156 F.3d 384 (2d Cir. 1998), to support their claim, that case is plainly distinguishable. *Furlong* involved a suit by doctors who had declined assignment for Medicare payments, challenging as a violation of due process the Secretary of Health and Human Services' failure to provide them with any mechanism for administrative appeal of a fiscal intermediary's decision to set reimbursement for procedures at a particular rate. The court of appeals held that the doctors had a property interest in receiving payment for services rendered at the proper rate. *Id.* at 392-396. This case, however, does not involve the payment of money for work done. Rather, it involves only the authority of Congress to prescribe the eligibility requirements for discretionary relief from deportation.

even if Nicaraguan members of the class mistakenly abandoned their asylum applications to pursue suspension of deportation, that fact could not have created a constitutionally protected interest in obtaining suspension of deportation on the terms governing that form of relief at that time. The INS is simply not empowered to bind Congress or the BIA to authorizing suspension of deportation on particular terms. There is no basis for concluding that the INS made a guarantee to Nicaraguans that their suspension of deportation applications would be reviewed favorably by the BIA, or that it could have legally done so.[17]

3. Petitioners also argue (Pet. 16-20) that the INS should be estopped from applying the stop-time rule of IIRIRA § 309(c)(5) because it previously encouraged Nicaraguans to apply for suspension of deportation and accepted their application fees, even though it knew that Congress might enact the stop-time rule that subsequently rendered them ineligible for suspension. Petitioners also urge the Court to decide whether a party seeking to invoke estoppel against the government must show affirmative misconduct on the part of the government, and if so (or even if not), whether the government's alleged actions in encouraging Nicara-

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[17] Petitioners suggest (Pet. 14) that the INS was under a constitutional obligation to advise Nicaraguans either that they should continue to pursue their asylum applications, or that Congress might later alter the terms on which suspension would be unavailable. There is no support for that contention, and a similar one was rejected by the Eleventh Circuit in *Jean*, *supra*, 727 F.2d at 981. *Asani* v. *INS*, 154 F.3d 719, 726-728 (7th Cir. 1998), held only that IJs must follow the Attorney General's regulations requiring them to advise potentially eligible aliens at their deportation hearings of the opportunity to apply for suspension of deportation. *Andriasian* v. *INS*, 180 F.3d 1033, 1041 (9th Cir. 1999), stated that an alien may not be surprised at his asylum hearing with an issue of which he had no previous notice. Neither case suggests that the INS must affirmatively advise large classes of aliens of their right to apply for asylum or that the terms governing suspension of deportation may be altered by Congress.

guans' suspension applications warrant estoppel. This case, however, is not an appropriate vehicle for resolution of any broad questions about the availability of estoppel against the government, for it is clear that under any standard there is no basis for estoppel in this case.

Although the Court has noted that it is questionable whether estoppel may ever lie against the government, see *OPM* v. *Richmond*, 496 U.S. 414, 423 (1990), it has made clear that, "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Servs.*, 467 U.S. 51, 61 (1984). Thus, the party claiming estoppel against the government must show at a minimum that the government misrepresented the law, that the party relied to its detriment on the misrepresentation, and that such reliance was reasonable. *Ibid.* In this case, there was no misrepresentation; the INS never suggested to petitioners or other Nicaraguan nationals that Congress would not change the law governing suspension of deportation. Nor is there any basis for petitioners' charge (Pet. 14) that the government was encouraging Nicaraguans to apply even while it was lobbying Congress for the changes to the INA that rendered petitioners ineligible for suspension. As we have explained (pp. 5-7, *supra*), the Department of Justice did not support the application of the stop-time rule to already-pending cases, and it pointed out to Congress that such application to pending cases would make ineligible aliens who had already applied for relief. Thus, while the Department did generally support the new stop-time rule enacted in IIRIRA, insofar as it was to be applied to future proceedings, it did not request that Congress direct that the rule be applied to pending cases, including petitioners' applications.

There is also no basis for estoppel in petitioners' contention (Pet. 18) that the INS was aware that changes in the

law were looming but failed to inform petitioners of that potentiality. In the first place, as the court of appeals observed (Pet. App. A33), "Congress sometimes appears likely to do things it never actually does," and the INS cannot predict with certainty whether or when changes to the immigration laws will be enacted. Moreover, the Court has already concluded that misinformation provided by federal employees to private persons about the *current* state of the law will not form the basis for estoppel. See *OPM* v. *Richmond*, 496 U.S. at 423; *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961). It follows *a fortiori* that the INS's failure to inform petitioners about a potential future change in the law that might be enacted by Congress and that might affect their eligibility for relief from deportation could not form a basis for estopping the government from applying that change in the law once Congress enacted it and expressly directed that it be applied to pending cases.[18]

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[18] For the convenience of the Court, we have lodged with the Clerk the following materials referred to in this brief: Complaint, with Exhibits 1-4; Resp. Exh. B2 (letter from Assistant Attorney General Andrew Fois to Rep. Lamar S. Smith (July 12, 1995)); Resp. Exh. B3 (letter from Deputy Attorney General Jamie S. Gorelick to Rep. Henry J. Hyde (Sep. 15, 1995)); Resp. Exh. B4 (letter from Deputy Attorney General Jamie S. Gorelick to Rep. Richard A. Gephardt (Mar. 13, 1996)); Memorandum from INS General Counsel Paul W. Virtue, on the Administrative Closure of EOIR Proceedings for Aliens Eligible for Repapering (Dec. 7, 1998); Memorandum from INS General Counsel Owen Cooper, on the Administrative Closure of EOIR Proceedings for Non-Lawful Permanent Resident Aliens Eligible for Repapering (Dec. 7, 1999).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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